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In the

Supreme Court of the United States.

October Term, 1931.

No. 621.

The United States of America,
Appellant,

v.

William Randolph Scharton.

APPELLEE'S BRIEF.

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v.
WILLIAM RANDOLPH SCHARTON.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

The appellant, United States of America, appeals from the ruling of the District Court of the United States for the District of Massachusetts, sustaining the plea in bar of appellee herein to an indictment returned against him in that Court (R. pp. 7 and 8).

The appellee was indicted on an indictment in two counts for alleged violations of section 1114 (*b*) of the Revenue Act of 1926 (44 Stat. 116; U.S.C. title 26, sec. 1266) (R. pp. 1, 2, 3, 4, 5, 6).

The indictment in each count thereof alleges that the defendant "unlawfully did willfully and knowingly attempt to defeat and evade a large part . . . of a tax upon his net income for the calendar year . . ."

The tax involved in the first count is for the calendar year 1926, and in the second count for the calendar year 1927. The offense is laid in the District of Massachusetts, on March 11, 1927, in the first count, and on April 16, 1928, in

the second count. The first count alleges that said attempt to defeat and evade said tax "was an offense involving the attempting to defraud the United States of America," but no such allegation is to be found in the second count. In each of said counts "overt acts" are alleged on certain dates, but an examination of the indictment will show that in the first count no "overt act" was committed after March 14, 1927, and in the second count no "overt act" was committed after April 16, 1928. Neither count formally avers a continuing offense.

To this indictment the appellee, on September 4, 1931, filed a plea in bar, praying judgment by the Court that he be dismissed and discharged, and said indictment quashed, on the ground that in each count it appears the offense charged was committed more than three years next prior to the finding of the indictment, and for this reason the indictment is barred by the Statute of Limitations for internal-revenue offenses (sec. 1110 (*a*), Revenue Act of 1926) (R. p. 6).

The District Court (Lowell, J.), having considered the appellee's plea in bar, on November 20, 1931, held that, as the indictment was not brought within three years of the offenses charged against the defendant, and as the offenses charged by the indictment did not involve the defrauding or attempting to defraud the United States or any agency thereof, the defendant's plea in bar was sustained and the indictment quashed (R. p. 7).

The Government petitioned for appeal from the order quashing said indictment (R. p. 7).

Statutes Involved.

Section 1114 (*b*) of the Revenue Act of 1926 (44 Stat. 116; U.S.C. title 26, sec. 1266) provides:

> "Any person required under this title to collect, account for and pay over any tax imposed by this title,

who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 1110 (*a*) of the Revenue Act of 1926 (44 Stat. 114; U.S.C. title 18, sec. 585), the Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws," approved July 5, 1883, as amended, is re-enacted without change, as follows:

"No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: Provided, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, (but this proviso shall not apply to acts, offenses, or transactions which were barred by law on June 2, 1924: . . .)."

Question Presented.

The sole question presented by the record is whether the limitation applicable to this statute is the three-year Statute of Limitations, or the six-year period prescribed in section 1110 (*a*) of the Revenue Act of 1926.

ARGUMENT.

Before considering the real issue in this case, there are two considerations that ought to be disposed of, viz., continuous offenses and "overt acts."

Continuous Offenses.

It cannot rightfully be argued that these offenses are continuous offenses, some portion of which is within the three years next preceding the finding of the indictment, for the following reasons:

(*a*) The offenses as charged, viz., two specific attempts to defeat and evade one's income tax, are by their very nature instant and not continuous offenses, even though it is alleged that some part of the income tax payable remains unpaid at the date the indictment was returned into court.

> "But whatever this may be it constitutes the criminal act of withholding [pension money], which is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment. There is in this but one offense. When it is committed the party is guilty and is subject to criminal prosecution and from that time also the Statute of Limitations applicable to the offense begins to run . . . the crime as shown in this case was not a continuous one . . ."

United States v. *Irvine*, 98 U.S. 450.

(*b*) Nor does the indictment either directly or formally charge this offense to be continuous.

> "An indictment must charge an offense directly and not inferentially."

Brewer v. *United States*, 287 Fed. 636.

"Overt Acts."

These words, "overt acts," appear, not in the charging, but in the descriptive, part of this indictment. If the alleged acts of the appellee, characterized in the indictment as "overt acts," are an essential element in this indictment, then it will be observed that none of them is within the three years next preceding the finding of the indictment. The appellee is charged with making oath to his returns on March 10, 1927 (R. p. 2), and on April 16, 1928 (R. p. 5), and with filing his tax returns on March 11, 1927 (R. p. 2), and on April 16, 1928 (R. p. 5).

The rule of law respecting "overt acts" and the Statute of Limitations is stated in *United States* v. *Bradford*, 148 Fed. 413 (affirmed 152 Fed. 216; certiorari denied, 206 U.S. 563), where this Court said:

> "The moment the conspiracy is formed and an 'overt act' is committed by one of the conspirators, that moment the offense can be prosecuted and the statute of limitations begins to run as regards that conspiracy and that particular 'overt act'."

Since the offenses charged in the indictment are not continuous offenses—nor indeed does the indictment pretend to so charge them—and none of the so-called "overt acts" nor either of the specific acts charged in the charging part of the indictment is within the three years next prior to returning the indictment into court, this appeal may not be sustained unless the six-year period of limitations is applicable.

The Issue.

The issue, therefore, is whether the offense of attempting to defeat and evade one's income tax is an attempt to defraud the Government within the meaning of section 1114 (*b*) of the Revenue Act of 1926.

I.

NO INTERNAL-REVENUE OFFENSE IS WITHIN THE PROVISO CLAUSE OF SECTION 1110 (*a*) OF THE REVENUE ACT OF 1926 UNLESS THE ELEMENT OF "DEFRAUDING OR ATTEMPTING TO DEFRAUD" THE UNITED STATES IS MADE AN ESSENTIAL INGREDIENT THEREOF EITHER (A) *expressly* BY THE TERMS OF THE STATUTE CREATING THE OFFENSE OR (B) *explicitly* BY THE ESSENTIAL DEFINITION OF THE WORDS USED IN SAID STATUTE.

> "Its purpose is to apply the six year period to either case in which defrauding or attempting to defraud is an ingredient under the statute defining the offense."
>
> *United States* v. *Noveck*, 271 U.S. 201.

See also *Bailey* v. *United States*, 13 Fed. (2d) 325 (C.C.A.), and—

Capone v. *United States*, 51 Fed. (2d) 609, 619 (C.C.A.).

In the Noveck case this Court was dealing with the six-year proviso of the General Statute of Limitations (Rev. Stat. sec. 1044, amended by Act of November 17, 1921, sec. 582, title 18, U.S.C.) applicable to other than capital offenses. The words and phrasing of that statute are substantially indentical with those used in section 1110 (*a*) of the Revenue Act of 1926.

In the instant indictment it is alleged in the first count of the indictment that—

> "said unlawful and wilful attempt to defeat and evade said tax was an offense involving the attempt to defraud the United States of America" (R. p. 1).

Regarding the use of a similar phrase in the Noveck indictment this Court said:

> "That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage."
>
> *United States* v. *Noveck*, 271 U.S. 201.

II.

BUT THE ELEMENT OF "DEFRAUDING OR ATTEMPTING TO DEFRAUD" THE UNITED STATES IS NOT MADE AN ESSENTIAL INGREDIENT OF THE OFFENSE CREATED BY SECTION 1114 (*b*) REVENUE ACT OF 1926, VIZ., ATTEMPTING TO DEFEAT AND EVADE ONE'S INCOME TAX EITHER—

(A) Expressly by the terms of that statute, or—

(B) Explicitly by reason of the essential definition of the words of such statute.

(A) The element of defrauding the United States is not *expressly* made an ingredient of the offense of defeating or evading one's income tax by the terms of the statute creating this offense.

The truth of this proposition is at once apparent upon a reading of the statute itself (1114 (*b*), Revenue Act, 1926).

In this respect the statute in question differs from, *e.g.*, sections 261 and 306, title 26, U.S.C., which denounce the offense of unlawfully carrying on the business of a distiller, "with intent to defraud the United States of the tax on the spirits distilled"; and the offense denounced by section 29 of the Criminal Act, viz., uttering and publishing a forged endorsement with attempt to "defraud" the United States, which latter offense was considered in the case of *Bailey* v. *United States*, 13 Fed. (2d) 325 (C.C.A.). In each of these two instances cited the element of defrauding the United States is expressly made an essential ingredient of the crime defined.

(B) Nor is the element of "defrauding" the United States *explicitly* made an ingredient of the offense of defeating or evading one's income tax by reason of the essential definition of the words used in the statute defining this offense.

This indictment, and likewise the statute upon which it is founded, depends upon the essential definition and explicit

meaning of two principal verbs, viz., "defeat" and "evade." "Defrauding" is not an ingredient in the essential definition or the explicit meaning of either of these two verbs, such, for example, as "embezzlement."

The word "evade" has a widely varying meaning.

"Evade: v. i. 1. To escape; to slip away.
2. To attempt to escape; to practice artifice or sophistry for the purpose of eluding.

"Evade: v. t. 1. To get away from by artifice; to avoid by dexterity, subterfuge, address or ingenuity; to escape from cleverly; as, to evade a blow, a pursuer, a punishment; to evade the force of an argument.
2. Hence, to baffle or elude, or to be baffling or elusive to.
Syn. Avoid, escape, shun; baffle, foil, steal away from."

Webster's New International Dictionary (1931), p. 758.

So, too, the word "defeat" has an equally varying meaning:

"Defeat: v. t. 1. To undo; disfigure; weaken; destroy.
2. To render null and void, as a title; to frustrate, as hope; to deprive, as of an estate.
3. To overcome or vanquish, as an army; to check, to disperse, or ruin by victory; to overthrow.
Syn. Baffle, disappoint, frustrate."

Webster's New International Dictionary (1931), p. 584.

The burden is not on the appellee to show that "defraud" may not *sometimes* include the element of "defeat" or "evade." Rather is it that the Court, if the appellant is to prevail, must be satisfied that the essential meaning of the words "defeat" and "evade," as used in section 1114 (*b*) of the Revenue Act of 1926, *necessarily and always includes* "defraud."

To "defraud," a more comprehensive word, may ordinarily include the element "defeat" and "evade," but there is no authority for the proposition that "defeat" and "evade" necessarily include "defraud."

The word "defraud" has a wide and varied meaning.

The word "defraud" has been used very liberally in many cases that have come to this Court. Practically any wrong calculated to obstruct or impair the Government's efficiency, without regard to financial or property loss, has been held to be a "fraud" upon the United States.

Curley v. *United States,* 130 Fed. 1; certiorari denied, 195 U.S. 628.
Haas v. *Henkel,* 206 U.S. 462.
Hyde v. *Shine,* 199 U.S. 62.
Federal Trade Com. v. *United States,* 211 U.S. 370.
United States v. *Hutto,* 256 U.S. 524.

Obviously to hold, in a case like the case at bar, that "defeat" or "evade" is synonymous with "defraud," would render nugatory that portion of section 1110 (*a*) of the Revenue Act of 1926 which has to do with the three-year limitation for internal-revenue offenses. For it is difficult to conceive of a violation of an internal-revenue law which, applying the rule often laid down in conspiracy cases, would not amount to a "defrauding" of the United States.

"There must be attributed to Congress a tacit purpose to maintain a long established distinction between

offenses essentially different . . . a distinction whose practical importance in the criminal law is not easily over-estimated."

United States v. *Robinowich*, 238 U.S. 78.

The plain purpose of the proviso of section 1110 (*a*) is to apply the six-year period to every case in which "defrauding or attempting to defraud" the United States is an ingredient under the statute defining it.

United States v. *Noveck*, 271 U.S. 201.

It would seem that any doubt with respect to the present case ought to be removed by the decision in *United States* v. *Noveck*, 271 U.S. 201:

"Plaintiff in error contends that, as the perjury in this case is charged to have been committed in the making of an income tax return, and is especially alleged to have been committed for the purpose of defrauding the United States, the offense is brought within the proviso to section 1044, and that the six-year period of limitation applies. But the alleged purpose to defraud the United States is not an element of the crime defined in section 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage. In re Lane, 135 U.S. 443, 448, 10 S. Ct. 760, 34 L. Ed. 219. The construction of sections 125 and 1044 contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified in section 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three-year period fixed by section 1044 was applicable before the proviso

was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. *Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain.* (Italics ours.) The language in question does not require the construction contended for. *Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six-year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 (Comp. St. sec. 10201) affords an illustration.* But perjury as defined by section 125 does not contain any such element." (Italics ours.)

The reference of this Court, speaking in the Noveck case, to "Sec. 37" (title 18, sec. 88, U.S.C.) as an apt illustration of what Congress intended by the proviso clause in the Statute of Limitations suggests the propriety, as well as the force, of citing a number of statutes which involve violations of the revenue laws, and which are made to contain as a necessary ingredient, by *express* provision of the statutes creating them, the element of defrauding the United States. See the following:

U.S.C. title 26, sec. 261—Distiller defrauding or attempting to defraud the United States of tax.

U.S.C. title 26, sec. 306—Carrying on distillery without giving bond, etc., forfeitures.

U.S.C. title 26, sec. 316—Distiller's books—false entries, etc.

U.S.C. title 26, sec. 328—Rectifier's returns — unlawfully rectifying.

U.S.C. title 26, sec. 417—Forging stamps.

U.S.C. title 26, sec. 525—Withdrawing from unstamped containers for bottling, or bottling on brewery premises, etc.

U.S.C. title 26, sec. 555—Oleomargarine—fraud by manufacturer.

U.S.C. title 26, sec. 667—Fraud, forfeiture — white phosphorus matches.

U.S.C. title 26, sec. 775—Tobacco manufactured by one person for another or on shares; stamps; fraud.

U.S.C. title 26, sec. 790—Relanding tobacco or snuff unlawfully; penalty; forfeiture.

U.S.C. title 26, sec. 843—Cigars manufactured on shares, commission, or contract; stamping; fraud.

U.S.C. title 26, sec. 851—Exportation of manufacturing cigars; relanding cigars unlawfully; penalty.

U.S.C. title 26, sec. 1180—Forging, counterfeiting, or fraudulently using stamps.

U.S.C. title 26, sec. 1181—Removing or concealing articles with intent to defraud the United States.

U.S.C. title 26, sec. 1184—Possession of property with intent to sell in fraud of law, or to evade taxes.

U.S.C. title 26, sec. 1185—Same—seizure.

U.S.C. title 26, sec. 1186—Sales to evade tax; forfeiture; recovery.

U.S.C. title 26, sec. 1188—Disposing of or receiving empty stamped packages.

Aside from the revenue laws, many other Federal offenses might be pointed out which have the same import, *e.g.*, section 29 of the Criminal Code, considered in *Bailey* v. *United States*, 13 Fed. (2d) 325 (C.C.A.).

Conclusion.

It is therefore respectfully submitted that for the reasons herein set forth the judgment of the Court below ought to be affirmed.

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